

In re ) Fair Hearing No. 15,006  
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Appeal of )

The petitioner appeals a decision by the Department of Social and Rehabilitation Services (SRS) proposing to revoke her Family Day Care Home Registration certificate based on alleged violations of the regulations involving discipline and care of children and the number of children in care. This hearing was commenced on July 29, 1997, at which time the petitioner appeared pro se, and was reconvened on November 4, 1997 and February 3, 1998, at which time the petitioner was represented by counsel. During the pendency of the proceeding the petitioner agreed to operate under a restrictive license.

1. The petitioner operates a family day care business at her house which is situated on the grounds of a farming operation which is run by her husband. She has been a registered day care provider for at least three years. She is one of a handful of providers in her area who offer care to parents who work the second shift, that is from three in the afternoon until eleven at night. At the time the proposed revocation was made, the petitioner had been trying to obtain permits to significantly expand the day care

facility.

2. The Department's contact with the petitioner and her operation had been fairly minimal before the matter at issue, consisting of a visit in response to a complaint that the petitioner was smoking around the children in November of 1995. On that visit, the Department found that the petitioner actually smoked in an area outside of the day care and took no action other than to advise her that she needed to practice and post an emergency evacuation procedure at her home. The site visitor reviewed the regulations with the petitioner, as she always does during these visits, including those involving discipline and number of children in care, and receive a reacknowledgement of their importance from the petitioner.

3. The proposal to revoke the petitioner's license stemmed from information gathered in the investigation of an anonymous complaint received on February 3, 1997, from another day care provider (later identified as R.T.). She said she had been told by one of her new customers, T.A., that while her children had been in the petitioner's care, they and other children, had been spanked several times each day and that her two-year-old daughter had been bitten by the petitioner in an effort to discourage the child from biting and that the bite had drawn blood and left a bruise.

4. This report prompted an investigation by the division of day care licensing which included an interview

with T.A., interviews with the petitioner and her husband, and interviews with several of the children in care and some of their parents. During the course of the investigation it also came to the Department's attention (based on information supplied by the petitioner herself) that the petitioner's day care had an excess number of children in attendance on sixteen occasions during the prior three months. Following this investigation, the Department mailed the petitioner a notice dated April 23, 1997, that she was found to have violated several of the Department's regulations and citing the information gathered and relied upon by the Department to reach those conclusions. A copy of that letter is attached hereto as Exhibit No. One and incorporated by reference herein to show what notice was sent to the petitioner. The petitioner requested a review of this proposal and a meeting was set up with a representative of the Commissioner of SRS. Following this meeting, the Commissioner sent a letter dated July 21, 1997, acknowledging and enumerating the petitioner's rebuttal information, including information that she had corrected the numbers problem, but concluding that the information was not sufficient to rebut the allegations and that revocation was justified based on the seriousness of the violations. That letter is appended hereto as Exhibit No. Two and incorporated herein by reference to show the Commissioner's position.

5. The petitioner appealed to the Board and sworn testimony was taken from a good number of witnesses, including the Department's day care investigator (who testified twice), a child who was in the petitioner's care, that child's mother, T.A. (who also testified twice), an SRS child abuse investigator, the petitioner, her husband, members of eight families with children who were or had been in the petitioner's care, the day care provider who reported the petitioner and the licensing supervisor. The following summaries and findings are based upon the testimony given by these persons under oath at hearing.

6. The investigator for the Department, who has been a day care licenser for nine years, testified that in addition to interviews with the petitioner, the petitioner's husband and T.A., she also interviewed the older children in four other families (a total of six children) which currently used the petitioner's day care. The investigator testified with regard to what those six children told her. However, she admitted that she had no specific memory of what those children said without reference to a written summary she had prepared in connection with the case. The summary was introduced into evidence. No written detailed notes taken at the time of the interviews with the children nor tapes could be offered into evidence showing the questions asked of the children and the actual responses given. The written summaries were brief and conclusory and,

by the investigator's own admission, contained only negative, not favorable, remarks that were made about the petitioner and her husband by the children. Because there was nothing upon which to independently assess the accuracy and reliability of the statements allegedly made by the children, it would be unfair to the petitioner to give those hearsay summaries any evidentiary weight as tending to prove the facts stated therein.

7. The investigator had discussed, as a general reminder, appropriate disciplining measures and the number of children which could be in care at any given time with the petitioner during her visit in November of 1995. She and the petitioner discussed particularly how many children under the age of two could be in care at any given time. There is no evidence that there was any discussion at that point about overlapping numbers of children during a shift change.

8. A.M., a twelve-year-old girl who had been in the petitioner's care on the second shift at the time in question, testified on direct examination at the hearing that she had been unhappy at the petitioner's home, had disliked the seven o'clock bedtime, that the petitioner had yelled at the children but had never said "shut-up" and that she had observed the petitioner bite a child (T.A.'s two year old daughter) who had bitten another child. She had denied seeing any spanking, biting or hitting although she

said that the petitioner's husband had a loud and gruff manner which frightened her. On cross-examination by the petitioner, the girl changed her testimony and said she had never seen any biting by the petitioner. On re-direct she changed her mind again and said she had seen the biting. The hearing officer concludes from her demeanor and words that this witness was both highly suggestible with regard to the adults questioning her and intimidated by the proceedings so as to render her testimony unreliable. No factual conclusions can be drawn either in favor of or against the petitioner from this testimony.

9. A.M.'s mother testified following her. She said that her daughter had complained to her about the loudness, gruffness and early bedtimes. However, in light of her daughter's ambiguous statements under oath, no conclusion can be fairly drawn about what occurred at the day care from the repetition of these out of hearing statements. The mother herself rarely visited the day care home as A.M. and her younger sister were dropped off at the day care by a bus and were driven home at 11:00 p.m. by the petitioner. The evidence also shows that the mother signed a contract with the petitioner before day care was begun there in which she acknowledged that a 7:00 o'clock bedtime was enforced for all children who stayed during the second shift. It is fair to say, however, that the mother was not happy about the enforcement of that bedtime for her older child.

10. Given the weak character of the children's hearsay and A.M.'s sworn testimony presented in this matter, the Department's case rests chiefly on the testimony of T.A., a young woman whose two children were in care at the petitioner's day care for almost two years and who herself lived in the petitioner's home and worked at the day care for about six or seven months. Many of the facts regarding the relationship of T.A. and the petitioner and her husband are hotly contested as are many of the observations made by T.A. at the home. The parties have essentially agreed on the following basic facts: T.A., having fled an abusive husband, was a single mother who was attending college and looking for a job. Her two young daughters, aged four and two, began attending the petitioner's day care in February of 1995. T.A. was living in an apartment where she was being harassed and stalked by a neighbor. In April of 1996, the petitioner and her husband, out of sympathy for T.A., offered to move T.A. out of her apartment and invited her to live with them while she was seeking employment and finishing school. T.A. and her two children lived (rent free) in the petitioner's home for a number of months. T.A. slept on the living room sofa and helped out at the day care. The petitioner, her husband and T.A. became friends while she was living there. Eventually, their relationship deteriorated and T.A. was asked to move out in September of 1996. After moving out, the petitioner's children continued

to stay at the day care until early January of 1997. Thereafter, T.A. found a new day care provider. T.A. in response to questions from her new day care provider about reasons she was dissatisfied with her former day care answered that her own child and other children had been mistreated by the petitioner and her husband at the day care. Upon learning this, the new day care provider called SRS anonymously to report what T.A. had told her. Subsequent to the initiation of the SRS investigation, the petitioner and her husband filed a small claims action against T.A. on February 27, 1997, and obtained a judgment against her on April 23, 1997 for \$1,682.30 in unpaid child care expenses which she was to repay at a rate of \$15.00 per month. On April 1, 1997, a second claim was filed and another judgment of \$2,412.33 was obtained which required a \$30 per month payment.

11. On February 5, 1997, the SRS day care investigator, following up on the anonymous complaint determined from the names of the children that T.A. was their mother and paid an unannounced visit to her at her place of employment to question her about the allegations. T.A. was surprised and upset at the visit and indicated to the SRS investigator that she feared being implicated in the matter because she had let her children remain in the day care for so long. The investigator had no memory of that day other than what was in her typewritten report. That



report dated February 7, 1997, indicated that T.A. had told her that her daughter had been bitten by the petitioner, that she saw the bite, there was a bruise but it did not draw blood, and that there were teeth marks which looked like an adult's. The report also stated that T.A. said that the petitioner had bitten other children as well. T.A. was also reported to have said that the petitioner's husband had taken an eight-year-old boy by the hair and "bashed" his head into the wall and that both the petitioner and her husband spanked the day care kids.

The investigator's handwritten notes (one page containing about a dozen brief disjointed descriptions) taken the day of the interview, February 5, 1997, are somewhat at variance with this typewritten report. The notes indicate that T.A. said she "saw" the petitioner bite her daughter, that children are regularly spanked by the [petitioner's last name] with an "s" added indicating more than one person and variously that the petitioner's husband "hits and spans kids". It also indicated that T.A. reported that there were more than twenty-five children in care at a time.

12. Because there were allegations of physical abuse, an SRS child welfare investigator (as opposed to SRS' day care licensor), became involved in this matter. She interviewed T.A. on February 7, 1997, and prepared a written report dated February 28, 1997, which included reports that

T.A. was concerned that she would be viewed as a bad parent in this situation for leaving her children at a day care where biting and spanking occurred and feared repercussions from the petitioner for her involvement in the investigation. That report contained information that T.A. had witnessed the petitioner biting children in order to teach them a lesson about that practice, that T.A. reported that when an eight-year-old boy with ADHD would not go to bed, the petitioner's husband grabbed him by the back of the neck and put him into time-out and that she saw him bang the boy's head "fairly hard" into the wall about four times but he did not cry; that she had seen a bruise on her four-year-old child's bottom which she believed had been caused by the petitioner's husband spanking the child and that the petitioner had as many as twenty-five children in care at one time. The report also contained a statement that T.A. had seen the petitioner bite her two year old daughter and that there were teeth marks, but no black and blue marks and no bleeding and that the marks disappeared the next day. However, under questioning, the SRS investigator, after referring to her handwritten notes of that day, said that T.A. had actually said the petitioner told her that she had bit her daughter and that the bite was black and blue on her arm. She concluded that her typewritten report was incorrect on that point. The SRS investigator did not find child abuse because she could not determine that these

incidents met the criteria for acceptance of an abuse report which requires more than a transitory injury. This matter was referred back to the day care division as a regulatory issue. T.A.'s credibility was not an issue for the investigator and did not form the basis for SRS' decision not to find abuse. She felt T.A. had tried at that point to recall the incidents with as much accuracy as possible.

13. R.T., the new day care provider, also testified under subpoena at the hearing. She had interviewed T.A. with regard to caring for her children in December of 1996.

At that time, T.A. had told her that she needed to change providers because her children were being abused. She specifically recalls being told that T.A.'s daughters were spanked and bitten (leaving a bruise and drawing blood on the younger child), that the children were not allowed to sit on the couch and that they were afraid of the petitioner and her husband. She described T.A. as being "consumed" with the notion that she had to leave her children in the petitioner's care for at least two more weeks because if she did not give appropriate notice she would have to pay for the two weeks anyway. R.T. told her that she did not need to give a two week notice under those circumstances and felt this should be reported to SRS and tried to get T.A. to take that action. T.A. refused saying that she did not want to get involved. When no report was made in a few weeks, R.T. felt that she had to report this (as a mandated reporter

herself). T.A. was furious when she found out that R.T. had reported the matter to SRS saying that she feared this report would lead the petitioner to come after her in court for day care expenses which she still owed and had agreed to pay but was not paying because of her resentment over the way her children were treated.

The children did not start day care with R.T. the day they were supposed to (January 6, 1997). T.A. told R.T. that they were sick and staying with her mother that day. R.T. later found out that they were actually in their last day of care with the petitioner that day. She does not know why T.A. told her a lie about that and questioned how bad the abuse could have been at the petitioner's day care if T.A. continued to leave her children there.

The children did come the next day and, thereafter, the day care situation went without incident and the two became friends. In April of 1997, however, they had a falling out over T.A.'s treatment of her current boyfriend, an old friend of R.T. R.T. asked T.A. to take her children out of the day care and on their last day R.T. told T.A. that she had been talking on the phone with the petitioner to get her side of the story. She described T.A. as causing an inappropriate scene at the day care after this news.

Thereafter, R.T. and the petitioner often talked on the telephone and became friends. Sometimes they had long night-time conversations until the early hours of the

morning in which they shared information about T.A. which R.T. believes revealed a lot of "inconsistencies". However, she pointed out that she originally recalled that T.A. had told her that the petitioner and her husband both had spanked the children and that as many as twenty-five children might be in day care at a time. She said that T.A. had later told her that the petitioner did not do the spanking but only her husband and that she had not seen the petitioner bite her child but had been told that by the petitioner and that she had seen the bruises. She had also testified that T.A. had explained that things were good when her children first started going there and it was not until much later, when she moved into the house, that she became aware of the abusive situation.

In July of 1997, shortly before the first hearing, the petitioner called R.T. and asked her to write a letter supporting her at the hearing. R.T. told the petitioner that she did not want to become involved but agreed to after she heard the petitioner's husband angrily shouting and cursing at her in the background. She wrote the supporting letter while the petitioner was in the room with her and let her review it. After the petitioner reviewed it, she rewrote it, although she says it still contained her own thoughts. Her testimony was consistent with her statement in the letter. She testified that she is unaware of T.A. actually telling any lie to her other than with regards to

who was caretaking her children in early January and admitted she had no actual knowledge of anything that went on at the petitioner's day care.

13. T.A. testified under subpoena twice at the hearing, on the first day, when the petitioner was representing herself, and on the third day in order to allow the petitioner's attorney to cross-examine her as she was the key eyewitness for the Department. T.A. testified that while she was living at the petitioner's home she was frequently there when children were in care because at that time she was unemployed and only taking three college courses. T.A. assisted the petitioner, although she was not a paid employee. She testified that she had never seen the petitioner herself spank or hit any children or use abusive language towards them though she did "yell" at the children.

She was told on one occasion by the petitioner that she had bitten her youngest daughter that day in order to prevent her from biting another child. She did not give the petitioner permission to take that action. She testified that contrary to reports made by the day care investigator, she had never said that she saw the petitioner bite her child but that it had been reported to her by the petitioner herself. During her first round of testimony she testified that she had not seen the petitioner bite any children. When questioned with regard to that answer on the second round of testimony, she said that she did see the petitioner

bite one child, Is., on one occasion and that any testimony she gave to the contrary was due to a misunderstanding of the question which she thought was asking her whether she had ever seen the petitioner bite her children. She had observed a bite mark on the daughter's arm. She also remarked that the petitioner did not allow the children to sit on her furniture, particularly her sofa, and required them to play on the floor which she thought was unusual and difficult for the children.

She testified, however, that she had observed the petitioner's husband regularly disciplining children in care by spanking them. She personally observed him spank at least two of the children when they did not go to sleep at bedtime at least twice per week and observed that he was angry when he administered the spankings. T.A. never saw the petitioner oppose any spankings administered by her husband although she usually witnessed them. In fact, she would threaten the children with spankings by her husband as a means of disciplining them. She admitted herself that she had spanked her own children and had allowed the petitioner's husband to spank her children while she lived there. However, she was unaware of this behavior before she started living there. She was also unaware before moving into the house that the petitioner did not allow the children to sit on her furniture.

She further testified that on one occasion during the

evening shift after the children were in bed, she heard the petitioner's husband warn a child who suffers from hyperactivity that he would be punished if he did not go to sleep. He was having difficulty getting to sleep because it was still early in the evening and he had a lot of energy.

After a couple of warnings she said she saw the petitioner's husband pull the child from his bed by the neck and take him to a wall next to the refrigerator used as a "time-out" spot where he banged his head on the wall, two or three times. Under questioning, T.A. admitted that she was lying on the living room sofa and did not see the child actually being pulled from the bed but rather heard him yell not to pull his neck so she assumed that was happening. She did reaffirm that from her position on the sofa she was clearly able to and did see the petitioner's husband and the child after they came out of the bedroom and went to the kitchen and did actually observe him bang the child's head against the kitchen wall. On another occasion, she observed the petitioner's husband angrily knock a child several times on the head who was standing in "time-out" and saw him forcibly turn the head of another child, Is., who was looking around while standing against the wall in "time-out." Most of the children were afraid of the petitioner's husband because of the spankings and his loud voice. Older children were threatened with "time-out" in the milking barn where the petitioner's husband could keep an eye on them and



some were actually required to go there. T.A. also testified that a five year old child was required to clean up after herself when she urinated in her pants and was sent to bed before dinner and required to remain there until she left the day care which was around 11:00 p.m., although she was allowed to have dinner.

T.A. testified that her departure from the petitioner's home was sudden (after a two week notice) because the petitioner ordered her to leave after her husband admitted he was "in love" with T.A. T.A. said she had not encouraged and had no interest in any romantic relationship with the petitioner's husband. The petitioner and her husband gave her money in order to help her move out and thereafter she found a job which she has continued to hold more than one year later and has been promoted. She further testified that she was contacted by SRS while at this job with regard to the report they received, that she was nervous during the interview and only reluctantly cooperated fearing that she might be implicated in any investigation which might conclude that her children had been abused, not only because she had been present during this alleged abuse, but also because the children continued in the petitioner's day care for a few months after she moved out. She denied having any motivation to hurt the petitioner and her husband although she resented paying back day care expenses because of the treatment she saw. She did not report the abuse nor did she

encourage anyone else to report it because she feared stirring up the petitioner and her husband because of the money she owed them which at that point they had made no attempt to collect. She stated that she has tried to be truthful in her testimony to the investigators and under oath and felt she had been consistent. She stated, however, that she had been surprised and very nervous during her first interview and may have garbled details which she was better able to sort out as she reflected on them. She said she came only reluctantly to the hearing and under subpoena and tried to be careful about the details. She agreed that she had not been careful when talking with R.T. about the bite injury and had possibly exaggerated its appearance to her. She also agreed that she had probably overestimated the number of children in care when she said that it was twenty-five. After counting the names of the children off, she testified that at times there had been as many as fifteen in care. She further admitted that she told a lie to her new day care provider when she said that her children were being cared for by her mother on January 6, 1997. She did this because she was afraid to take them from the petitioner's home but also afraid to make it seem that she had left them there. T.A. reported that the petitioner's husband told her at the small claims hearing after the investigation had been done that she would "pay for this" which she interpreted as meaning for the difficulty they

were having with SRS.

T.A. was furious when she found out R.T. had reported the matter to SRS because she feared that the petitioner would get angry and take action against her for the overdue child care expenses and because she feared she might be implicated if the children were found to have been abused. Eventually, however, she became good friends with R.T. until they had a personal disagreement involving a mutual friend which prompted R.T. to sever her day care relationship with T.A. in April of 1997. Several months later, R.T. told T.A. that the petitioner tried to get her to write a letter in connection with the investigation and hearing "bashing" T.A. and branding her as a liar for purposes of the hearing, but R.T. claimed she had refused to do so. T.A. also said R.T. was angry about getting involved in this matter and had planned to resist her subpoena to attend the hearing but T.A. encouraged her to go because if she didn't "it would be illegal".

13. SRS's investigator confirmed that the interview with T.A. was unannounced, had occurred at work and that while T.A. was cooperative, she was nervous and upset that this was happening and scared about the ramifications of the investigation with regard to her care of her own children. However, she felt the testimony that she had given under oath at the hearing was very similar to what she had said to her on that first day.

14. The petitioner described herself as a person who has always loved to be with children and who is involved with the PTO at school, as well as many activities with her own children. She has operated the day care since February or March of 1995. About that time she started providing care for T.A.'s children and got to know her through that connection. As she grew to know T.A. she became involved with her personal situation and she and her husband assisted T.A. with both personal and financial support to escape a man who was stalking her and to install her in their home in the Spring of 1996, until she could get back on her feet. By September of 1996, however, their relationship was strained, and T.A. was asked to move out of the house and get her own apartment with \$900 the petitioner and her husband loaned to her.

The petitioner says she never saw her husband spank the children, nor have either of them used an abusive tone or language with the children. She testified that she was also present when her husband took the eight-year-old hyperactive child out of the bedroom and claims that he merely led him to the "time-out" spot after warning him to be quiet. This child was a difficult one who was often left for days at a time without his medication by his irresponsible mother. The little girl who urinated in her pants was put to bed early on four occasions but was allowed to have supper in accordance with a plan developed with her mother. She

denies ever biting the petitioner's daughter or any child and that bite marks on her arm were left by other children. When children bite each other, she says she puts them into "time-out." "Time-out" consists of standing by the wall next to the kitchen microwave oven for the number of minutes equal to a child's age. She says that all of the parents agreed to a 7:00 P.M. bedtime but agrees that it might not be age appropriate for the older children, of eleven or twelve. The petitioner admits that she had extra children on the occasions her records show but that was because during overlaps in the shifts, some parents come late to pick up their children after the children for the next shift have been delivered. She did not want to say "no" to parents who relied on her and did not know that these brief period of overlap on a second or third shift were considered violations by the Department. Since this problem was pointed out to her by the Department in the Spring of 1997, she has told parents that they must pick up their children promptly and has had no more overlaps.

The petitioner developed a relationship with R.T., T.A.'s new day care provider, in the Spring of 1997, when R.T. started to phone her after her relationship with T.A. had broken down. They had conversations a couple of times per week, sometimes until 4 or 5 A.M. She did ask R.T. to write a letter supporting her and she reviewed that letter but says she did not tell R.T. what to write.

15. The petitioner's husband is a dairy farmer with four children who helps out his wife in the day care when she needs it. He gets up at 4 in the morning and returns to the house for breakfast at 6:30 and again at noon. He comes back to the house at six and goes to bed about ten. He admits that he has a loud voice which might scare some of the children but says that he does not yell obscenities at them or spank them. With regard to the eight year old boy who was made to stand in time-out, the petitioner's husband said that the child was up way too late (10 o'clock) was jumping up and down, and threw a blanket and pillow into the ceiling fan breaking it. After giving him a chance to stop, he took him out of the bed and led him by the arm to the "time-out" spot in the kitchen where he stood for eight to ten minutes. Children are sometimes required to sit in the barn while he is working there as a form of punishment and while there, they sit on top of a storage bin.

He says with regard to T.A., that she and his wife had become good friends and that to humor his wife he helped her move out of her apartment and into their home when his wife believed she was in danger from the stalker. He personally moved her out and helped her to get a restraining order against this man. He denies having developed any romantic feelings for T.A. and says she left because of the stress of the two families living together for so long and because he felt they had put too much money into her in the form of car

repairs and loans. He believes T.A. has made her claims to get even with them for the small claims action they won against her after which, he claims, she said, "this is not over by a long shot." He agrees that he became angry when R.T. initially refused to write a supporting letter because he felt that she knew things about T.A.'s character which others should know.

16. The petitioner has had many satisfied customers over the years, several of whom (eleven from eight different families, including one who is the petitioner's cousin) testified at the hearing as to the high quality of care provided to their children. Half of the families were still using the day care and half had used it in the past two years but no longer sent their children there for various reasons unrelated to these charges. These persons testified that they had not observed any bad language, yelling or physically inappropriate disciplining of children while their children (or grandchildren) were in care and that their children had not reported any such behavior. Most said their children liked the petitioner and her husband and enjoyed going to the day care. All felt that their children were safe and well-cared for at the petitioner's home. Several parents remarked that they appreciated the early and late hours at which the petitioner would accept their children and their day-to-day scheduling flexibility and that they would be hard pressed to duplicate the hours of

service they received from the petitioner. One grandparent noted that he felt his grandson had become better behaved since going to this day care. The mother of the five year old girl who was wetting her pants said that she and the petitioner had agreed together on putting her to bed as a method of curbing this behavior. These parents typically saw the petitioner when they brought and picked up their children. Except for one, who was a neighbor and who had socialized a few times with the petitioner during the day, none of the parents had spent any time at the home outside of their drop off and retrieval visits. One parent remarked that she had seen T.A. there so often that she thought that she worked there. That parent was also appreciative of the petitioner, her husband and T.A. because they supported her in a claim made by her ex-husband that she was abusing her own children.

17. Photographs presented of the premises at the hearing and a diagram drawn by the petitioners of their kitchen support T.A. in her claim that she could see the "time-out" spot in the kitchen from the living room couch.

18. The supervisor of the SRS investigator who had recommended revocation to the Commissioner testified that he had made that recommendation because he thought the allegations in the case were accurate and reliable and felt that they represented serious violations of regulations relating to the health and safety of children. He felt the



revocation was justified because the petitioner and her husband had a poor grasp of what children need, ran the home for their convenience rather than the needs of the children, and were unwilling or unable to abide by the regulations. He specifically cited the head banging and spanking by the petitioner's husband and the biting by the petitioner which demonstrated inappropriate disciplining strategies in dealing with difficult children; an overly harsh use of "time-out" as a punishment rather than a cooling off period; the seven o'clock bedtime which was difficult and frustrating for older children; the chronic difficulty with too many children in care during certain periods; and, the practice of sending the children to the barn for discipline where they were exposed to dangerous equipment with little likelihood of supervision by persons occupied in milking.

19. The evidence given in this matter by the petitioner and her husband is in direct conflict with that given by T.A., their customer and long-term houseguest. The petitioners argue that her testimony is not credible because it is internally inconsistent and motivated by a desire for revenge against them due to a personal falling out and their judgment against her in small claims court. They also argue that it is inconsistent with the testimony of other customers called as witnesses to their treatment of the children.

The hearing officer concludes, however, that the

testimony given by T.A. at the hearing under oath was very credible. Her demeanor was tense but earnest and though she was cooperative she was clearly not eager to be in the witness chair. She appeared to answer questions carefully and to minimize rather than to embellish the facts, the latter being what one would expect if the answers had been fabricated to implicate the petitioners. The one discrepancy which existed between her first day and second day testimony was whether she had seen any children being bitten. She explained that discrepancy in terms of her own misunderstanding of the question first posed to her and unequivocally stated that she had seen the petitioner bite a child, though not her own. She also readily corrected testimony she had given that she had "seen" the boy pulled from the bed by the neck to saying that she had heard it and had assumed he had been pulled from the noises.

The statements which T.A. made under oath are consistent with the contemporaneous handwritten records of the child abuse division investigator who interviewed her in the first week of February. The brief notes taken by the day care division investigator say different things with regard to whether T.A. saw the biting of her daughter and who did the actual spanking. However, in light of the poor investigative recording which occurred with the children who were interviewed by this investigator (the admission of which was strenuously objected to by the petitioner) it

would be unfair to conclude that her brief summaries were accurate restatements of T.A.'s statements either. On the contrary, it is found that under two direct and cross examinations, the petitioner has related the same details with regard to her allegations.

T.A. has also candidly admitted she spoke carelessly and in an exaggerated manner when talking casually to R.T. about the situation and that she had lied to R.T. on one occasion. If she were lying under oath she could easily have denied these embarrassing allegations which could not be independently proven. The fact that she did not deny these unflattering facts further indicated that she was trying to tell the truth, however painful it might be.

Neither can it be concluded that T.A.'s allegations were driven by a desire to seek revenge. While she clearly has a strained relationship with the petitioners and was in debt to them, T.A. herself did not report the abuse and had her own compelling reasons for not becoming involved in this matter in any way. Three witnesses (both investigators and R.T.) attested to the fact that T.A. feared that she would be implicated if her children were found to have been abused. In addition, she feared that the petitioner and her husband would make an attempt to collect unpaid child care expenses, a fear which was soon realized. When she was forced to become involved in the investigation, the statements she gave were made before any action was

initiated against her in small claims court. Given the chronology of events in this matter, if any party could be said to be out for revenge, it is more likely the petitioner and her husband who filed their small claims action against T.A. almost immediately after SRS made its investigation.

The petitioner's husband's credibility was undermined by his own demeanor the first day of the hearing when he was acting as his own attorney. He had difficulty controlling his temper and attempted repeatedly to argue with the witnesses. R.T.'s testimony that he became angry and threatening with her when she would not write a letter on his behalf is not consistent with his report of himself as a gentle man, but is consistent with T.A.'s report that he frequently lost his temper and was angry when he disciplined children.

The petitioner impressed the hearing officer as a person of bad judgment rather than bad intention. She was generally calm during the hearing but dissolved into tears rather than anger when she was required to testify about stressful events. Her response to the biting, spanking and head banging allegations was an unconvincing blanket denial.

Her solicitation and supervision of a testimonial from R.T. in this matter which she failed to view as problematic added to the hearing officer's impression that she had a skewed sense of propriety. Given the lack of credibility of her husband with regard to his own general temperament, her

support of his statements cannot be credited either. It is true that the customers who testified view her in a favorable light and are not aware of any problems at the day care. However, that supporting evidence cannot be heavily weighted since the attestants were a small sample of customers selected by the petitioner, none of whom themselves had spent much, if any, time in the petitioner's home and many of whom clearly had no one but the petitioner to rely upon for child care during their late shifts. Most importantly, none of these attestants were witnesses to any of the events described by T.A. In contrast, T.A. who said she had not herself been aware of the problems at the day care before she moved into the petitioner's home, spent six months living in the same household and was in an excellent position to observe what happened there. The testimony of B.M. at the start of the Department's case also makes it clear that not every parent was satisfied with the treatment of children at the petitioner's day care.

20. In addition to the findings made in paragraphs 1-12 above, the following findings of fact are also made:

A. The petitioner bit 2 year old F.A. and other small children who were in her day care as a method of discouraging them from biting other children. The bite on F.A. was severe enough to have left teeth marks for at least a day.

B. The petitioner's husband frequently becomes angry

with and spansks children in the day care setting as a form of discipline with the knowledge and consent of the petitioner.

C. Children are frequently required to go to the dairy barn and sit on a storage bin as a form of punishment where neither the petitioner nor her assistants are present. The petitioner's husband and his helper are in charge of supervising children who are sent to the barn but they do so while pursuing milking operations.

D. The petitioner's husband required an eight-year-old boy in the day care with a hyperactivity disorder to stand at a time-out wall at ten o'clock at night and while he was there banged his head into the wall three or more times. He also forcibly turned the head of another small boy who was standing in time-out.

E. The petitioner by her own admission had more than ten children in her care on fourteen occasions during a three month period in December through February of 1997.<sup>1</sup> On some occasions, she had as many as fifteen children in care at one time. The petitioner never received any specific warning from SRS about her excessive number problem

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<sup>1</sup> The evidence presented by the parties showed that all but two of the dates with excessive numbers of children were in December of 1996, and January and February of 1997. The other two were in February of 1996. The petitioner characterized this as a sixteen days excessive numbers problem in a one-year period. The SRS investigator said she had looked only at a three month period to reach this conclusion. In order to harmonize this discrepancy, the hearing officer has thrown out the two dates in February of 1996 and found fourteen problems in the three month period.

before this survey. There is no reason to believe that she has not corrected that problem since that time.

F. The petitioner enforces a 7:00 p.m. bedtime for all children in her care during the evening hours, regardless of age. She has also required (with the knowledge and consent of her parent) a five-year-old girl to go to bed as early as five o'clock p.m. as a method of discouraging wetting her pants.

ORDER

The decision of the Department to revoke the petitioner's day care registration certificate is affirmed.

REASONS

The Commissioner of the Department of Social and Rehabilitation Services has the authority to adopt rules and regulations governing the day care registration program, including standards to be met and conditions for revocation.

33 V.S.A. § 306(b)(1). Those rules and regulations are required by statute to be "designed to insure that children in . . . family day care homes are provided with wholesome growth and educational experiences, are not subjected to neglect, mistreatment or immoral surroundings." 33 V.S.A. § 3502(d). Such rules and regulations have been adopted and are found in the "Regulations for Family Day Care Homes", effective April 1, 1993. Furthermore, the Commissioner has

the specific authority to revoke registrations "for cause after hearing". 33 V.S.A. § 306(b)(3).

Among the regulations adopted by the Commissioner are the following:

DEFINITIONS

- CHILD CARE - The developmentally appropriate care, protection and supervision which is designed to ensure wholesome growth and educational experiences for children outside their homes for periods of less than 24 hours a day in a day care facility.
- CORPORAL  
PUNISHMENT - The intentional infliction of pain by any means for the purpose of punishment, correction, discipline, instruction or other similar reason.
- REVOCATION - The formal act of closing a day care home due to violation of these regulations. . . .
- SERIOUS  
VIOLATION - A violation of group size, staffing requirements, or any violation which immediately imperils the health, safety or well-being of children. Serious violations may also include corporal punishment, lack of supervision, physical or sexual abuse or health and safety requirements.
- SUPERVISION  
OF CHILDREN - The knowledge of and accounting for the activity and whereabouts of each child in care and the proximity of staff to children at all times assuring immediate intervention of staff to safeguard a child from harm and maintenance of the program of the facility.

SECTION I - ADMINISTRATION



. . .

3. A person shall be prohibited from the Registered Family Day Care Home when her/his presence or behavior disrupts the program, distracts the staff from their responsibilities, intimidates or promotes fear among the children, or when there is reason to believe that their action or behavior will present children in care with risk of harm.

. . .

5. The Registrant shall be responsible for the actions of all caregivers, as well as all other persons in the home, and shall ensure that compliance with the Family Day Care Home registration Regulations is maintained.

. . .

#### SECTION II - PROGRAM:

1. A registrant may provide care in their home to six (6) children at any one time and, in addition to the six may care for up to four (4) school-age children for not more than four hours daily per child.

#### Options Table

##### Option A

Six children any age including up to two children under age two per caregiver. These children may be replaced when their stay ends.

Four schoolage children not to exceed four hours per child. These children may not be replaced by other schoolage children when their stay ends. These children may be in care on a full day basis on snow days, emergency school closings, and vacations which occur during the school year.

Children who reside in the home are not counted in the limited above, unless they are under age two.

#### SECTION III-GUIDANCE/DISCIPLINE

1. The caregiver shall use positive methods of guidance/discipline which encourage self control, self direction, self-

esteem and cooperation.

Guidance/discipline shall be designed to meet the individual needs of each child including the Registrant's and caregiver's own during the hours children are in care.

2. The caregiver shall treat each child with respect and encourage children to treat each other respectfully. Children shall be given opportunities to learn, socialize and cooperate as individuals, as well as group members. The caregiver shall promote self-esteem and cooperation through positive reinforcement and role-modeling.

. . .

4. Guidance/discipline shall not include any form of cruel and unusual punishment, including corporal punishment, such as, but not limited to:

- a. Hitting, shaking, biting, spanking, pinching.

. . .

- e. Inflicting mental or emotional punishment  
such as humiliating,  
shaming, threatening  
or frightening a  
child.

SECTION V - HEALTH AND SAFETY:

1. The Registrant is responsible for the health and safety of children in care.

. . .

10. Children in care shall be protected from any and all conditions which threaten a child's health, safety and well-being. This includes protecting children from stoves, pools, poisons, asbestos, wells, known vicious animals, medications, dust or chips from lead paint, traffic and other hazards.

. . .

20. Areas used by children shall be well lighted, well ventilated, clean, free from hazardous substances and sufficient in size to permit children to move

about freely.

SECTION VI - RELATIONSHIP BETWEEN REGISTRANT AND  
DIVISION OF LICENSING & REGULATION:

. . .

9. A violation of any section of the law or regulations regarding a Family Day Care Home may be cause for the revocation of the Registration Certificate.

. . .

11. When violations are found to exist, the Department may offer a registrant the opportunity to develop a program improvement plan whereby the violations will be corrected within a time period specified by the Division. Such opportunity may not be provided when the violation poses risk of harm or is of a repeated nature.

Regulations for Family Day Care Homes  
Agency of Human Services Department of  
Social & Rehabilitation Services  
Division of Licensing & Regulation  
April 1, 1993

The regulations listed in detail above make it abundantly clear that biting<sup>2</sup>, hitting, frightening and spanking children in day care are strictly prohibited. The regulations also make it clear that the petitioner is responsible for the acts of other persons who spank, frighten or hit children in her care. The petitioner is

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<sup>2</sup> The original letter of revocation did not mention the biting incidents nor the disciplining of children in the cow barn. However, the petitioner was made aware early on during the course of the proceedings that these were events which also formed the basis of the revocation. The petitioner did not object to the inclusion of these incidents as a basis for revocation. In fact, she presented evidence intended to rebut these allegations. Even if she had objected and these grounds were excluded, the hearing officer concludes that there were sufficient other serious violations proved so as to justify the Commissioner's actions.

also required under the above regulations to assure that children in her care are supervised and not placed in hazardous situations. Deficiencies in supervision, corporal punishment, physical abuse, or safety requirements are specifically listed in the regulations as violations which may be considered serious.

It is the decision of the Commissioner that the facts found in this matter constitute serious violations of the regulations as set forth above and described in the preceding paragraphs. The evidence supports that contention as the petitioner or her husband have either bitten, spanked, hit (banging of the head) the children in care; as the children have been exposed to the hazards of a dairy barn during periods of discipline with inadequate supervision; and as the children have been treated in an angry verbal manner and without respect by the petitioner's husband who lives on and works in close proximity to the premises of her day care.

When there are serious violations of the regulations, as in this case, the Commissioner has the authority to determine what action to take and the "cause" needed to revoke a day care registration certificate if he deems it an appropriate remedy. 3 V.S.A. § 8814, Huntington v. SRS, 139 Vt. 416 (1981), Fair Hearing No. 10,414. The Board may only overturn such a decision if the Commissioner has acted arbitrarily, capriciously or has otherwise abused his

discretion. Fair Hearing No. 12,804.

The petitioner does not argue with regard to the above violations that they are insufficiently serious to warrant a revocation of her registration certificate. She either denies that they occurred or that a hazard was presented. There is no evidence upon which it can be concluded that the Commissioner acted arbitrarily in this instance. On the contrary, these violations are so repeated and pervasive and so directly affect the health and safety of the children at issue, the Commissioner could be seriously faulted if he had taken any other course. As this matter is supported by the law, the Board is bound by the decision of the Commissioner to revoke and cannot substitute its judgment. 3 V.S.A. § 3091(d) Fair Hearing Rule No. 17.

The petitioner does take issue with the Department's finding that she should have her registration revoked for violation of the regulation regarding number of children in care. She admits that she did have an excess number of children in care but states that it was due to a misunderstanding and that it has been the Commissioner's practice in this kind of situation to issue a warning and give an opportunity to correct such a situation prior to taking such action. In support of this contention she points to prior fair hearings, particularly Fair Hearing No. 6667, in which the Board required the Department to give fair warning and to allow correction of violations which

were not particularly egregious or of a repeated nature. That view is also supported by the regulation at Section VI (11) cited above which gives the Department the discretion to allow the development of a program of improvement for violations if there is no risk of harm posed and the violations are not of a repeated nature.

The petitioner's point is well-taken and certainly would be a viable argument if there were no other violations involved here. At hearing, the Department did not deny that proposing revocation at this point if the numbers violation were the sole problem would be unlikely. However, given the other serious problems in this matter, the Department did not give the petitioner an opportunity to correct this problem in order to avoid revocation. Given the fact that the Department has considerable grounds for proposing revocation without these violations, it cannot be said that the petitioner was treated unfairly by failing to receive the opportunity to correct this violation.

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